No. 87-636

In the Supreme Court of the United States

OCTOBER TERM, 1987

EFTHIMIOS A. KARAHALIOS, PETITIONER

v.

DEFENSE LANGUAGE INSTITUTE/FOREIGN LANGUAGE CENTER, PRESIDIO OF MONTEREY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a federal employee who alleges that his exclusive bargaining representative breached its duty of fair representation may bring a private cause of action for damages in a federal district court, or whether his exclusive remedy is to file an unfair labor practice charge with the Federal Labor Relations Authority.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner, Efthimios Karahalios, is employed by respondent-employer, Defense Language Institute/Foreign Language Center, Presidio of Monterey (DLI), as a Greek language instructor (Pet. App. 3a). In 1976, he applied for promotion to a newly created "course developer" position (*ibid.*). As part of the application process, petitioner took a competitive examination (*ibid.*). Based on his test score and other qualifications, DLI initially selected petitioner to fill the "course developer" position (*ibid.*).

Respondent union, the National Federation of Federal Employees, Local 1263, which represents the bargaining unit of which petitioner is a non-union member, subsequently filed a grievance protesting the selection process that DLI used in selecting petitioner for the "course developer" position (Pet. App. 3a). Specifically, respondent union complained that one of the

other members of the bargaining unit, Simon Kuntelos, had been demoted from such a course developer position when that position was eliminated in an earlier reorganization of DLI and that Kuntelos was entitled to, but had not received, some non-competitive consideration for the new course developer position (*ibid.*). Respondent union did not advise petitioner that it had filed this grievance (*id.* at 6a). Nor did it advise him when it decided to pursue Kuntelos's grievance to arbitration (*ibid.*). Rather, petitioner learned of the union's actions only after an arbitrator, in August 1977, ordered DLI to reconstitute its "course developer" selection process (in accordance with certain guidelines specified in the award) and to reconsider its promotion of petitioner (*id.* at 3a-4a).

As a result of the arbitrator's ruling, DLI allowed Kuntelos to take the competitive examination that petitioner had taken (Pet. App. 4a). In addition, DLI provided Kuntelos with substantially more time to complete the examination than had been afforded to petitioner (*ibid.*). Kuntelos received a score on the examination that was two points higher than petitioner had received (*ibid.*). DLI then demoted petitioner and promoted Kuntelos to the course developer position (*ibid.*).[1]

Petitioner objected to his demotion and filed two grievances with DLI (Pet. App. 4a). DLI denied these grievances (*ibid.*). Petitioner requested that respondent union take his grievances to arbitration, but the union declined to do so; it told petitioner that its earlier arbitral efforts on behalf of Kuntelos precluded it from seeking arbitration on his behalf (*ibid.*).

Petitioner responded by filing unfair labor practice charges with the Federal Labor Relations Authority (FLRA) (Pet. App. 4a). He alleged that DLI had breached the collective bargaining agreement by its actions and that respondent union had breached its duty of fair representation by not seeking arbitration on his behalf (*ibid.*). The FLRA's General Counsel disagreed with petitioner's breach of contract claim, but agreed with the duty of fair representation claim and issued a complaint to this effect against respondent union (*ibid.*). But when respondent-union agreed to post a notice for all bargaining unit employees, stating that in the future it would not inform them that it could not represent more than one employee competing for a position, the regional director of the FLRA, without consulting with petitioner, settled the complaint (*ibid.*).

[1] Kuntelos held the "course developer" position from May 1978 to October 1979, at which time the position was again abolished (Pet. App. 4a).

2. After unsuccessfully appealing the regional director's decision to the FLRA's General Counsel, petitioner filed this suit against DLI and the union in federal district court, alleging that DLI had breached the collective bargaining agreement and that the union had breached its duty of fair representation (Pet. App. 4a-5a). The district court held that Title VII of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. (& Supp. IV) 7101 *et seq.*, imposes on a union of federal employees an "implied duty of fair representation" and that this implied duty is privately enforceable in federal court under 28 U.S.C. 1331 (Pet. App. 5a). The court expressly rejected respondents' argument that the CSRA's unfair labor practice provisions and procedures provide the sole means for enforcing the union's duty of fair representation, reasoning that the unfair labor practice provisions and procedures serve broad public interests and thus may not effectively remedy the injuries that an individual suffers as a result of a union's breach of its duty of fair representation (*ibid.*; 534 F. Supp. 1202, 1207-1208 (N.D. Cal. 1982)). The court also held that it could not assume jurisdiction over petitioner's claim against DLI (Pet. App. 5a-6a; 544 F. Supp. 77, 77-78 (N.D. Cal. 1982)).[2] On the merits, the court ruled that the union had in fact breached its duty of fair representation (Pet. App. 6a; 613 F. Supp. 440, 446-448 (N.D. Cal. 1982)).[3]

3. The Ninth Circuit reversed (Pet. App. 1a-13a). It initially stated (*id.* at 7a-8a) that, under *Vaca* v. *Sipes*, 386 U.S. 171

[2] The court reasoned (Pet. App. 5a-6a) that the action was for an amount greater than $10,000 and that, under the Tucker Act (28 U.S.C. 1346, 1491), such actions must be brought in the Claims Court.

[3] The court found fault (Pet. App. 6a) with respondent-union's failure to consult with petitioner about its decision to arbitrate on behalf of Kuntelos, with its failure to notify petitioner of the Kuntelos arbitration, and with its decision not to seek arbitration of petitioner's claim without considering its merits.

(1967), a private sector employee who is injured by a union's alleged arbitrary refusal to process a grievance can sue his union for breaching its duty of fair representation and his employer, under Section 301 of the Labor-Management Relations Act, 1947 (LMRA), 29 U.S.C. 185, for breaching the collective bargaining agreement. The court then stated (Pet. App. 8a) that, while "[t]here is no statutory provision analogous to Section 301 * * * under the CSRA," "this difference alone would not justify us in concluding that * * * Congress * * * intended to confer upon unions unlimited discretion." But the court found it significant (*id.* at 9a) that, "[w]hen Congress enacted the CSRA[,] the federal courts had implied a duty of fair representation not only under the National Labor Relations Act[,] as in *Vaca,* but also under the Railway Labor Act[,]" in *Steele* v. *Louisville & N.R.R.,* 323 U.S. 192 (1944); that, "[a]ware of these decisions and aware of how important *Steele,* the seminal case, has been in protecting the rights of racial minorities, Congress itself imposed the duty of fair representation on federal unions"; and that, nevertheless, "Congress * * * failed to provide jurisdiction in the federal courts to enforce the duty" (Pet. App. 9a). The court concluded that, while "*[a]rgumentum ex silentio* is normally weak," "[h]ere the silence of Congress appears to be deliberate" (*ibid.*).

In so concluding, the court noted that, in negotiating the final provisions of the CSRA, the Conference Committee rejected a provision that would have authorized federal courts to order parties to collective bargaining agreements to engage in arbitration (Pet. App. 9a-10a). The court recognized that "the provision which the Conference Committee eliminated did not deal with the claim of an employee against his union" (*id.* at 10a). But the court noted that "the enforcement scheme chosen by Congress showed a strong preference for keeping the interpretation and enforcement of collective bargaining agreements within the process of arbitration, to be reviewed in the first instance by the FLRA" (*ibid.*). It further noted that "there is an express provision that 'a labor organization which has been accorded exclusive recognition * * * is responsible for representing the interest of all employees in the unit it represents without discrimination' " (*id.* at 10a-11a (quoting 5 U.S.C. 7114(a)(1)), and that the FLRA has "the power to remedy a breach of this duty by awarding back pay * * *" (Pet. App. 11a). The court concluded that this "fit between the duty and the remedy provided" is determinative of the question presented (*ibid.*).

The court also recognized that "the FLRA has been criticized for not enforcing the duty of fair representation vigorously enough" (Pet. App. 11a). But the court noted that "[i]t is of course open to interpretation whether the small number of complaints actually issued reflects lack of zeal or lack of real problems in this area" (*id.* at 12a). And it added that "[t]he facts of this case * * * indicate that the existence of a district court remedy after investigation and issuance of a complaint by the General Counsel may lead to a tortuous path of litigation whose costs are disproportionate to the individual benefit achieved and whose protracted twists and turnings must be as disheartening to any eventual winner as they are to any eventual loser" (*id.* at 12a-13a). It thus concluded that, "whether the microcosm of this case is studied or whether the general practice of the FLRA is reviewed, no strong reason appears to overturn what seems to be the congressional intent to channel the grievances of federal employees to the [FLRA]" (*id.* at 13a).

DISCUSSION

Petitioner and respondent union appear to agree (Pet. 10-12; Br. in Opp. 4-5; Pet. Reply Br. 3-4) that, in Section 7114(a)(1) of the CSRA, Congress has expressly codified a duty of fair representation for federal-sector unions that is similar if not identical to the duty of fair representation that the courts have found implicit in the exclusive bargaining power granted to private-sector unions by the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, and the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*[4] They also appear to agree (Pet.

[4] Section 7114(a)(1) of the CSRA (5 U.S.C. 7114(a)(1)) provides that:

> A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements

10-12; Br. in Opp. 4-5) that this express duty of fair representation is enforceable by the General Counsel of the FLRA through the unfair labor practice provisions and procedures set forth in Sections 7116(b) and 7118 of the CSRA.[5] They disagree

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covering, all employees in the unit. An exclusive repesentative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

Several courts, as well as the FLRA itself, have held that this provision fully codifies for the federal sector the duty of fair representation that has been established in the private sector by implication under the NLRA and the RLA. See *AFGE* v. *FLRA*, 812 F.2d 1326 (10th Cir. 1987); *National Treasury Employees Union* v. *FLRA*, 800 F.2d 1165 (D.C. Cir. 1986); *Ft. Bragg Ass'n of Educators*, 28 F.L.R.A. No. 118 (Sept. 4, 1987). Like petitioner and respondents, we assume, for purposes of this case, that the provision in fact does so.

[5] Section 7116(b) of the CSRA (5 U.S.C. 7116(b)) provides, in pertinent part, that:

(b) For the purposes of this chapter, it shall be an unfair labor practice for a labor organization–

* * * * *

(8) to otherwise fail or refuse to comply with any provision of this chapter.

* * * * *

Section 7118 of the CSRA (5 U.S.C. 7118) provides, in pertinent part, that:

(a)(1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

* * * * *

(7) If the Authority * * * determines after any hearing on a complaint * * * that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of

only with respect to the question whether the CSRA's express duty of fair representation is also enforceable by a federal employee in a federal court action for money damages and other relief.[6] The proper resolution of this question has divided the courts of appeals, and the question is of concern to thousands of federal employees and the collective bargaining agents that represent them. Accordingly, we believe that this Court's review is warranted. We also believe that the court of appeals reached the correct result on the merits.

1. As the court below noted (Pet. App. 7a), there is a square conflict among the courts of appeals on the question presented. The Tenth Circuit has held that a federal employee alleging that his exclusive bargaining representative has breached its duty of fair representation may bring a private action in federal court to

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fact and shall issue and cause to be served on the agency or labor organization an order–

(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or

(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of an employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

* * * * *

[6] Whether a violation of the duty of fair representation is an unfair labor practice is a question presumably within the exclusive jurisdiction of the FLRA. Cf. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959). But the question remains whether Congress intended to create an " 'independent federal remedy' " for a violation of the duty of fair representation. See *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, No. 85-2079 (Feb. 23, 1988), slip op. 3 n.4; *Kaiser Steel Corp* v. *Mullins*, 455 U.S. 72, 83 (1982); *Connell Constr. Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616, 626 (1975).

enforce the duty. See *Pham* v *AFGE, Local 916*, 799 F.2d 634 (1986).[7] It appears that the Fourth Circuit has done so as well. See *Naylor* v. *AFGE Local 446*, 580 F. Supp. 137 (W.D.N.C. 1983), aff'd without opinion, 727 F.2d 1103 (4th Cir. 1984) (Table)), cert. denied, 469 U.S. 850 (1984). By contrast, the Eleventh Circuit (like the Ninth Circuit is this case) has held that an alleged breach of the duty of fair representation may be prosecuted only by the General Counsel of the FLRA, under the unfair labor practice provisions and procedures set forth in Sections 7116 and 7118 of the CSRA. See *Warren* v. *Local 1759, AFGE*, 764 F.2d 1395 (11th Cir.), cert. denied, 474 U.S. 1006 (1985). The Third Circuit appears to have so held as well. See *Wilson* v. *United States Bureau of Prisons*, 770 F.2d 1078 (1985) (Table), aff'g 585 F. Supp. 202 (M.D. Pa. 1984). This conflict among the circuits is an important one, because thousands of federal employees are represented by exclusive bargaining agents, which engage in a wide variety of activities that could give rise to claims for breach of the duty of fair representation. The Court should use this case to resolve the conflict.

2. On the merits, we believe that the decision below is correct. Although the evidence as to congressional intent is not clear cut, it appears, on balance, that Congress intended that the duty of fair representation applicable to federal-sector unions would be enforced exclusively by the General Counsel of the FLRA, under the unfair labor practice provisions and procedures set forth in Sections 7116 and 7118 of the CSRA.

a. Although the CSRA codifies a duty of fair representation (5 U.S.C. 7114(a)(1)), it does not expressly make that duty (or any other statutory duty) directly enforceable by a federal

[7] Contrary to respondent union's suggestion (Br. in Opp. 12), the Tenth Circuit's subsequent decision in *AFGE, Local 916* v. *FLRA*, 812 F.2d 1326 (1987), does not alter the *Pham* court's holding that a union's duty of fair representation may be privately enforced. It addresses only the scope of a union's duty of fair representation and the basis for deriving that duty in the CSRA; it does not decide whether that duty is enforceable outside of the unfair labor practice provisions and procedures set forth in the CSRA. See *id.* at 1327-1328.

employee in a federal or state court action. Indeed, the CSRA expressly empowers courts to act in only three instances: where a person is aggrieved by a final order of the FLRA (5 U.S.C. 7123(a)); where the FLRA petitions an appropriate court of appeals for enforcement of one of its orders or for appropriate temporary relief or restraining order (5 U.S.C. 7123(b)); and where, upon issuing an unfair labor practice complaint, the FLRA petitions a federal district court for temporary injunctive relief (5 U.S.C. 7123(d)). Thus, the duty of fair representation may be directly enforced by a federal employee in a federal or state court action only if a private cause of action for enforcement of the duty can be found by implication in the CSRA.[8]

b. In determining whether a private cause of action is implied by a federal statute, the Court has said that the "focal point" for analysis "is Congress' intent in enacting the statute." *Thompson* v. *Thompson*, No. 86-964 (Jan. 12, 1988), slip op. 4. "Factors relevant to this inquiry are the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 91 (1981)). See also *Thompson* v. *Thompson*, slip op. 4-5; *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 535-536 (1984); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981). Viewed in these terms, we do not believe that a private cause of action for breach of the duty of fair representation can be found in the CSRA.

(1) The language of the statute contains not even a hint that Congress intended to give federal employees the right to enforce the duty of fair representation in federal or state court actions. Section 7114(a)(1) of the CSRA provides only that "[a]n exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization

[8] If such a cause of action can be found by implication in the CSRA, then 28 U.S.C. 1331 and 1337 would provide federal court jurisdictional.

membership." This statutory language does not "explicitly confer[] a right directly on" individual federal employees. *Cannon* v. *University of Chicago*, 441 U.S. 677, 690 n.13 (1979). Rather, it contains only "a ban on discriminatory conduct" by exclusive bargaining agents (*id.* at 691-693). To be sure, this ban confers a benefit on the federal employees whom the exclusive bargaining agents represent. But "[t]he question is not simply who * * * benefit[s] from the Act." *California* v. *Sierra Club*, 451 U.S. 287, 294 (1981). The question is whether Congress intended that the federally conferred benefit "would be enforced through private litigation." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 18 (1979). And the Court has consistently held that statutory language of this type, which merely confers a statutory benefit on a particular class of persons, does not give rise to an inference that Congress intended to create a private cause of action for enforcement of the statutory benefit by those persons. See, *e.g.*, *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 145 (1985) (statute imposing liability for breach of fiduciary duties does not confer upon beneficiaries of benefit plans a private cause of action for non-contractual money damages); *Universities Research Ass'n* v. *Coutu*, 450 U.S. 754, 771-784 (1981) (statutory requirement that certain federal construction contracts contain a stipulation that laborers and mechanics will be paid "prevailing wages" does not confer upon employees a private cause of action for back wages); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 17-22 (statute proscribing certain fraudulent practices by investment advisors does not confer upon clients of investment advisors a private cause of action for money damages).

(2) "The structure of the statute[] similarly counsels against recognition of the implied right petitioner advocates in this case" (*Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. at 93). The CSRA carefully specifies how and by whom the duty of fair representation is to be enforced. It provides that it is "an unfair labor practice for a labor organization * * * to * * * fail or refuse to comply with any provision of this chapter" (5 U.S.C. 7116(b)(8)), which plainly encompasses the codified duty of fair representation found in Section 7114(a)(1)

of the statute. It further provides that any such unfair labor practice shall be remedied through the procedures outlined in Section 7118 of the statute, which authorize the General Counsel of the FLRA to investigate unfair labor practice charges, to issue complaints with respect to alleged unfair labor practices, and to seek backpay and other remedial orders from the FLRA for aggrieved federal employees. Finally, it provides that private persons may obtain judicial review only with respect to final orders of the FLRA (5 U.S.C. 7123(a)); that, in such appeals, the FLRA's findings of fact are to be conclusive if supported by substantial evidence (5 U.S.C. 7123(c)); and that "[n]o objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances" (5 U.S.C. 7123(c)). Where other statutes have contained such comprehensive and integrated enforcement schemes, the Court has said private causes of action should not be found by implication. See, *e.g.*, *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. at 146-147 & n.15; *Transamerica Mortage Advisors, Inc.* v. *Lewis*, 444 U.S. at 18-19; *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 571-574 (1979); *National R.R. Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974). Rather, "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement" (*Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. at 97).

(3) The legislative history of the CSRA, while not speaking directly to the question, further suggests that Congress intended that the duty of fair representation would be enforced exclusively by the General Counsel of the FLRA, under the unfair labor practice provisions and procedures established in Sections 7116 and 7118 of the CSRA. In discussing the availability of judicial review for actions arising under the CSRA, the House Report states both that "the General Counsel of the Authority makes the final decision as to the issuance of a complaint of an unfair labor practice" and that "[o]nly those labor-management rela-

tions matters specifically referred to in section 7123 shall be judicially reviewable." H.R. Rep. 95-1403, 95th Cong., 2d Sess. 58 (1978). The Senate Report states that "[a]ll complaints of unfair labor practices * * * that cannot be resolved by the parties shall be filed with the FLRA." S. Rep. 95-969, 95th Cong., 2d Sess. 107 (1978). Finally, as the court below noted (Pet. App. 9a-10a), the Conference Committee rejected a provision that would have authorized federal courts to order parties to collective bargaining agreements to engage in arbitration, so that "[a]ll questions of this matter w[ould] be considered at least in the first instance by the [FLRA]." H.R. Rep. 95-1717, 95th Cong., 2d Sess. 157 (1978). This legislative history is difficult to reconcile with the recognition of a private cause of action for enforcement of the duty of fair representation, in which a federal employee presumably could completely bypass both the unfair labor practice provisions and procedures and the expert administrative agency that administers them. It is therefore "one more piece of evidence that Congress did not intend to authorize a cause of action" (*Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 22).[9]

(4) When Congress enacted the CSRA and its express duty of fair representation, this Court had previously recognized implied causes of action under both the NLRA and the RLA for enforcement of the duty of fair representation applicable to private-sector unions. See *Vaca* v. *Sipes*, 386 U.S. 171 (1967) (NLRA); *Steele* v. *Louisville & N.R.R.*, 323 U.S. at 192 (RLA).

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[9] In *United States* v. *Fausto*, No. 86-595 (Jan. 25, 1988), the Court held that a non-veteran, excepted service federal employee could not challenge a 30-day suspension in the Claims Court, even though a pre-CSRA remedy existed and the CSRA provides *no* alternative administrative or judicial remedy. In reaching that conclusion, the Court noted that "[a] leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action," and particularly emphasized the dissatisfaction reflected in the legislative history with the " 'wide variations in the kinds of decisions * * * issued on the same or similar matters,' " "which were the product of concurrent jurisdiction, under various bases of jurisdiction, of the district courts in all Circuits and the Court of Claims" (slip op. 4, 5 (citation omitted)).

This Court has said that, "[w]hen Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts," the relevant "question is whether Congress intended to preserve the pre-existing remedy." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 378-379 (1982)). See also *Cannon* v. *University of Chicago*, 441 U.S. at 696-699. But, here, there is no pre-existing remedy, only the analogy to one, and substantial reason to believe that Congress did not intend to extend such a cause of action to the federal sector.

First of all, the Congress that enacted the CSRA may not have viewed the NLRA and RLA, with their implied judicial remedies, as the relevant benchmarks. While Section 7114(a))1) of the CSRA creates an express duty of fair representation that is similar if not identical to the implied duty of fair representation under the NLRA and the RLA, its language is taken almost verbatim from Executive Order No. 10,988, which, as amended by subsequent executive orders (see Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Exec. Order Nos. 11,616, 11,636, and 11,838, 3 C.F.R. 605, 634, 957 (1971-1975 comp.)), regulated labor-management relations in the federal sector before the CSRA. See Brower, *The Duty of Fair Representation Under the Civil Service Reform Act: Judicial Power to Protect Employee Rights*, 40 Okla. L. Rev. 361, 369-371 (1987); see generally *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 91-93 (1983). When the CSRA was enacted, the courts had almost uniformly held that the provisions of the Executive Order were not judicially enforceable (because the Executive Order was not "a law of the United States" within the meaning of 28 U.S.C. 1331). See, *e.g.*, *Stevens* v. *Carey*, 483 F.2d 188, 190 (7th Cir. 1973); *Local 1498, AFGE* v. *AFGE*, 522 F.2d 486, 491 (3d Cir. 1975); *Kuhn* v. *National Ass'n of Letter Carriers*, 570 F.2d 757, 760-761 (8th Cir. 1978). See generally *United States* v. *Professional Air Traffic Controllers*, 653 F.2d 1134, 1137 (7th Cir. 1981), cert. denied, 454 U.S. 1083 (1981).

Second, whatever Congress's understanding about the "contemporary legal context" in which it enacted Section 7114(a)(1) (cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran,* 456 U.S. at 381), the language, structure, and legislative history of the CSRA, as discussed above, suggest that Congress may have made a considered judgment *not* to create an analogue to the private cause of action for the enforcement of the duty of fair representation recognized by the courts in NLRA and RLA cases. Neither the NLRA nor the RLA as originally enacted contained any administrative mechanism for enforcing a duty of fair representation against unions. The absence of any such administrative remedy was a principal reason this Court offered for finding private rights of action implied by those statutory schemes. See *Vaca* v. *Sipes,* 386 U.S. at 180-183; *Steele* v. *Louisville & N.R.R.,* 323 U.S. at 205-207. See generally *Cannon* v. *University of Chicago,* 441 U.S. at 733-734 (Powell, J., dissenting). In the CSRA, however, Congress expressly established such an administrative mechanism for enforcing the duty of fair representation. The fact that Congress expressly made the violation of the duty of fair representation an unfair labor practice, without also expressly providing for a judicial cause of action, suggests that it considered private litigation to be an inappropriate means of enforcing the duty. See *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. at 20-21; cf. *Bush* v. *Lucas,* 462 U.S. 367, 388-390 (1983) (no judicial damage remedy for a wrong that can be remedied through the comprehensive scheme established by the CSRA).

In *Vaca* v. *Sipes, supra,* this Court held that, when Congress amended the NLRA to add an unfair labor practice provision that the National Labor Relations Board (NLRB) later interpreted to address duty of fair representation issues, Congress did not implicitly repeal the private cause of action that the courts had previously recognized under that statute. The Court gave three reasons: (a) "[a] primary justification for the preemption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative

agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union's duty of fair representation" (386 U.S. at 180-181); (b) "the unique interests served by the duty of fair representation doctrine" in the NLRA context would be frustrated by a refusal to recognize a private right of action under that statute (*id.* at 181-183); and (c) "intensely practical considerations * * * emerg[ing] from the intricate relationship between the duty of fair representation and the enforcement of collective bargaining [agreements]" favor recognition of a judicial cause of action for enforcement of the duty of fair representation (*id.* at 183-188). But each of these reasons is largely or wholly inapplicable in the CSRA context, which further suggests that Congress did not intend that the CSRA's duty of fair representation would be enforced through private litigation.

In the CSRA context, the principal justification for making the administrative remedy exclusive—*i.e.,* avoidance of conflicting rules and reliance on administrative expertise—applies with full force to the duty of fair representation. In contrast to the situation under the NLRA, where the courts began developing the doctrine that became the duty of fair representation well before the NLRB had a basis for assuming jurisdiction over such cases, the CSRA specifically directs the FLRA to define and enforce the duty of fair representation applicable to federal-sector unions, and the FLRA has been active from the statute's inception in doing so. See, *e.g., National Treasury Employees Union,* 10 F.L.R.A. 519 (1982), aff'd, 721 F.2d 1402 (D.C. Cir. 1983); *National Federation of Federal Employees,* 24 F.L.R.A. No. 37 (Dec. 5, 1986), petition for review dismissed *sub nom. Thompson* v. *FLRA,* 830 F.2d 1130 (11th Cir. 1987) (Table). The entry of the courts into this field of decisionmaking can only produce confusion and inconsistency. Moreover, there can be no doubt that the FLRA brings substantial pertinent expertise to this task. Section 7117 of the CSRA (5 U.S.C. 7117) charges the FLRA (and not the courts) with the responsibility for making "negotiability" determinations; these responsibilities provide the FLRA with considerable insight into how a union

formulates bargaining proposals and the reasons why a union engages in particular give-and-take at the bargaining table. In addition, whereas in the private sector courts review arbitration awards in actions brought under Section 301 of the LMRA, Section 7122 of the CSRA (5 U.S.C. & Supp. IV 7122)) charges the FLRA (and not the courts), with exceptions not relevant here, with the responsibility for reviewing arbitration awards; through this process, the FLRA has gained experience with union grievance and arbitration practices—experience that the courts cannot hope to duplicate.

Furthermore, in the CSRA context, refusing to supplement the unfair labor practice provisions with a private cause of action will not frustrate substantial "unique interests" that the duty of fair representation doctrine serves. In the private sector, the statutory grant of exclusive bargaining power to unions deprives individuals of their pre-existing right to make and enforce contracts with their employers. The duty of fair representation thus stands "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law" (*Vaca* v. *Sipes,* 386 U.S. at 182). In the federal sector, by contrast, employment is a result of appointment, not of contract (see *Army & Air Force Exchange Service* v. *Sheehan,* 456 U.S. 728, 735-741 (1982)), and the statutory grant of exclusive bargaining power does not strip a federal employee of substantial pre-existing rights. The employee has no right to make or enforce an individual contract of employment with his agency-employer, and the exercise of exclusive bargaining powers by the union does not deprive the appointed individual of any statutory or constitutional protections. In particular, the CSRA did not deprive petitioner of any rights he would otherwise have had or have been contractually able to obtain against his employer with respect to the promotion at issue. See *United States* v. *Testan,* 424 U.S. 392 (1976); *Arnett* v. *Kennedy,* 416 U.S. 134 (1974). Accordingly, while the duty of fair representation still stands as a desirable bulwark against arbitrary and capricious union action in the federal sector, a private right of action is clearly not necessary to ensure that its unique purposes are served; on the contrary, the duty of

fair representation can be enforced in the same manner as any other limitation on the power of federal-sector unions—by the General Counsel of the FLRA, using his discretionary authority under the unfair labor practice provisions and procedures of the CSRA. Cf. *Vaca* v. *Sipes,* 386 U.S. at 182-183 (unreviewable discretion of NLRB General Counsel significant *because* employees deprived of pre-existing forms of redress by enactment of federal labor laws).[10]

Finally, in the federal-sector, there are no "intensely practical considerations" emerging from the relationship between the duty of fair representation and the enforcement of collective bargaining agreements that favor recognition of a private cause of action for enforcement of the duty of fair representation. Those practical considerations arise in the private sector because collective bargaining agreements are enforceable in court under Section 301 of the LMRA; recognizing an independent cause of action for enforcement of the duty of fair representation allows the courts to consolidate such claims with breach of contract actions and to fashion comprehensive and appropriate remedies. See *Vaca* v. *Sipes,* 386 U.S. at 187-188; see also *Bowen* v. *United States Postal Service,* 459 U.S. 212 (1983) (damages to be apportioned between employer and union) The CSRA does not, however, contain an equivalent to Section 301 of the LMRA, and, as noted (page 4, *supra)* the Conference Committee in

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[10] As the court below recognized (Pet. App. 11a-12a), there is no basis for suggesting that the General Counsel of the FLRA has failed to enforce the duty of fair representation. See also *Warren* v. *Local 759, AFGE,* 764 F.2d at 1399 n.6 ("unpersuaded by Appellant's argument that the FLRA lacks zeal in prosecution of duty of fair representation claims"). Indeed, we are advised by the FLRA General Counsel's Office that, from 1984 to the present, the percentage of complaints issued against unions in cases charging violations of the duty of fair representation has been approximately the same as the percentage of complaints issued against unions arising out of all charges filed for any reason. In all events, as we noted in the text, Congress appears to have intended in the CSRA that federal employees would be subject to the General Counsel's unreviewable discretion on duty of fair representation charges (and all other unfair labor practice charges). Cf. *Touche Ross & Co.* v. *Redington,* 442 U.S. at 568 (1979) (citation omitted) (" 'the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.' ").

fact rejected a provision that would have allowed courts to entertain some such suits, precisely because the Committee believed that "[a]ll questions of this matter [should] be considered at least in the first instance by the Authority" (H.R. Rep. 95-1717, *supra,* at 157). Accordingly, the practical benefits associated with the recognition of a private right of action to enforce the duty of fair representation cannot be achieved in the federal sector.[11]

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[11] The comprehensiveness of the CSRA, combined with the absence of an express provision authorizing suits for breach of the collective bargaining agreement, precludes a suit for this purpose against the agency-employer. Cf. *United States* v. *Fausto, supra,*. Moreover, at least two courts have held that the Tucker Act (28 U.S.C. 1346(a)(2), 1491) does not provide a basis for an action against an agency-employer for violating its collective bargaining agreement. See *Serrano Medina* v. *United States,* 709 F.2d 104 (1st Cir. 1983); *Yates* v. *Soldiers' & Airmen's Home,* 533 F. Supp. 461, 465 n.8 (D.D.C. 1982); see also *Leath* v. *Stetson,* 686 F.2d 769 (9th Cir. 1982). Even if the Tucker Act provided such a basis, however, any claim for more than $10,000 would lie only in the Claims Court, which plainly could not provide a remedy for a breach of the duty of fair representation. See *Karahalios* v. *Defense Language Institute,* 544 F. Supp. at 78 n.1. Thus, proceedings would be bifurcated in many cases, even if the employer-agency could be sued in court on the contract.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988 – 202-037/60439